



DON Commercial Item Acquisitions

Provision/Clause Use Awareness Training

**Terms and Conditions in
FAR Part 12 Commercial Contracts**

March 2010



Discussion Topics

- Purpose
- Background
- Policy Overview
- Other Actions Unique to FAR Part 12 Acquisitions
 - **Discretionary Use, Tailoring or Supplementing of CI Provisions or Clauses**
- Provision and Clause Selection Process
 - FAR Standard Commercial Item (CI) Provisions/Clauses
 - DFARS CI Provisions/Clauses (including Deviation)
 - Other Government Unique Provisions/Clauses
 - Joint Contracting Command/Iraq Afghanistan (JCC/IA) & Head of Contracting Activity (HCA) Provisions/Clauses
 - Unique Approval Requirements
 - DON Matrix of FAR/DFARS and Other Provisions/Clauses
- Resources
- Summary



Purpose

- Provide an overview of the policies, procedures, and other information governing clause use in solicitations/contracts for commercial items; and
- Instill awareness of the unique approval requirements for use of provisions/clauses (terms/conditions) other than those set forth in FAR Part 12 (DFARS 212).



Background

- Section 821, FY2008 National Defense Authorization Act
 - Requires DoD to implement a plan to minimize number of government-unique contract clauses used in commercial contracts to those -
 - *Authorized by law or regulation; or*
 - *Any additional clauses relevant and necessary to a specific contract.*
- Why the new requirement? *Non-compliance with law.*
 - The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) limited the number of government-unique contract clauses on commercial contracts, but...
 - *Number of government-unique clauses has grown.*
 - *Contract clauses that are not required in law or regulation are being included in commercial contracts.*



Background (continued)

- A 2008 survey of Navy contracting activities that issued FAR Part 12 Commercial Contracts revealed:
 - Use of FAR/DFARS and other provisions and clauses (e.g. HCA component clauses) inconsistent with FAR Part 12 requirements;
 - Inconsistency/confusion regarding the application of “discretionary use” (FAR 12.301(e)) and “tailoring” (FAR 12.302) authorities in selection/use of provisions and clauses; and
 - Lack of clear guidance in Navy Marine Corps Acquisition Regulation Supplement (NMCARS) on provision or clause use in commercial item contracts.



Policy Overview

- DPAP memo of 17 Mar 2008 directed Military Services to develop and implement plan to minimize government-unique clauses in commercial contracts.
 - DoD policy is to limit the number of contract clauses consistent with stated statutory and regulatory requirements.
- DASN(A&LM) memo of 11 Jul 2008 provided a Navy/Marine Corps “Plan For Restricting Government-Unique Contract Clauses On Commercial Contracts” with these objectives:
 - Establish a template of FAR/DFARS/other clauses approved for use in CI acquisitions;
 - Revise NMCARS to prescribe senior level approval for use of unique clauses in CI acquisitions; and
 - Increase awareness of CI policies/procedures on clause use.



Policy Overview (continued)

- DASN(A&LM) memo of 29 Jul 2008
“Navy/Marine Corps Plan For Restricting Government-Unique Contract Clauses On Commercial Contracts” directed DoN HCAs to remind contract specialists to comply with FAR 12.301(a); *i.e.*, contracts for CI shall, to the maximum extent practicable, include only those clauses:
 - Determined to be consistent with customary commercial practice; and/or
 - Required to implement provisions of law or executive orders applicable to the acquisition of commercial items.



Policy Overview (continued)

- Before issuing a FAR Part 12 solicitation/contract, review FAR 12.3, DFARS 212.3, NMCARS 5212.3 and Annex 7, which:
 - List/prescribe a streamlined set of provisions/clauses that address commercial market practices and apply to commercial item acquisitions;
 - Contain specific instructions on use of other provisions/clauses; and
 - Describe when tailoring (revising) of existing **FAR Part 12.3 provisions/clauses** OR supplementing (adding other provisions/clauses) is permitted.
 - Tailoring or Supplementing:
 - May be done *only after conducting market research*, and
 - Within narrowly prescribed limits/approvals set forth in FAR 12.302, DFARS 212.302 and NMCARS 212.302.



Actions Unique to FAR Part 12 Acquisitions

- There are unique actions authorized by FAR Subpart 12.3 which affect the use of provisions/clauses in CI acquisitions:
 - Discretionary use of other FAR provisions/clauses (FAR 12.301(e));
 - Tailoring of provisions/clauses (FAR 12.302(c)); and
 - Supplementing of existing FAR provisions/clauses to require use of additional provisions/clauses (FAR 12.301(f)).



Discretionary Use of FAR Provisions/Clauses

12.301(e) Discretionary use of FAR provisions/clauses.

- Include other FAR provisions/clauses when their use is consistent with the limitations contained in 12.302. Examples:
 - FAR 16.506 clauses when an indefinite-delivery type of contract is used;
 - FAR 17.208 clauses when the use of options is in the Government's best interest;
 - FAR Part 23 clauses regarding the use of recovered material and bio-based products when appropriate for the item being acquired;
 - FAR Clause 52.245-1, Government Property, where Government property that exceeds the simplified acquisition threshold is furnished or where the contractor is directed to acquire property for use under the contract that is titled in the Government.



Tailoring - CI Unique Definitions of Terms

Tailoring means revising, editing or modifying the pre-existing instructions and/or terms and conditions contained in FAR Subpart 12.3 provisions/clauses to adapt these provisions/clauses to reflect current customary commercial practices as may be necessary to meet or protect the Governments interests. For example, FAR 52.212-4 has twenty (20) subsections addressing specific areas ranging from (a) Inspection/acceptance to (t) Central Contractor Registration. Tailoring would involve adding, deleting or revising language concerning one of those specific areas, but not adding terms concerning new areas.

Source: See NMCARS Annex 7, Table 7-3



Tailoring - Limitations

FAR 12.302 Tailoring of provisions and clauses for the acquisition of commercial items.

- The contracting officer shall **not tailor** any clause or otherwise include any additional terms or conditions ***inconsistent with customary commercial practice unless a waiver*** is approved in accordance with agency procedures.
- Agency procedures: DFARS 212.302(c) and NMCARS 5212.302
 - HCA is the waiver authority for tailoring FAR Part 12 clauses inconsistent w/customary commercial practice.
 - **Only after conducting market research**
 - ASN(RD&A) is the waiver authority if tailoring results in

HCA Component clauses cannot be added to CI acquisitions using the “tailoring” authority at FAR 12.302. Component clauses constitute supplementing and only ASN(RD&A) or Director DPAP may approve.



Supplementing - CI Unique Definitions of Terms

- **Supplementing** means adding newly developed provisions/clauses in commercial item acquisitions necessary to:
 - Reflect Navy-unique statutes applicable to the acquisition of commercial items (e.g. a new statute imposes a specific requirement on shipbuilding or facilities maintenance and is deemed to apply to commercial item acquisitions), or
 - As may be approved by the Navy Senior Procurement Executive (ASN(RD&A)) (e.g. a WAWF or ERP clause for use within Navy), or
 - By Director, Defense Procurement and Acquisition Policy (DPAP) without power of delegation (e.g. use of special clauses for Acquisitions in Support of Operations in Iraq or Afghanistan).
 - This also includes use of DFARS 252 and NMCARS 5252 provisions/clauses that are not specifically identified in the DON Matrix of FAR/DFARS and Other Government Unique

Source: See FAR 12.301(f) and NMCARS Annex 7, Table 7-3.



Supplementing - Limitations

- FAR 12.301(f): Agencies may SUPPLEMENT the provisions/clauses prescribed in this part (to require use of **ADDITIONAL** provisions or clauses) ONLY,
 - (1) as necessary to reflect agency unique statutes applicable to the acquisition of CI (i.e., DASN(A&LM), OR
 - (2) as may be approved by the agency senior procurement executive (i.e., ASN(RDA)) OR Director, DPAP.
- This authority is nondelegable.

No additional DFARS clauses or any HCA component clauses may be included in CI acquisitions UNLESS such clauses have been approved by DPAP or the NSPE (ASN RD&A).



Requests for Waivers - Tailoring

- FAR 12.302(c) Requests for waivers to tailor FAR clause 52.212-4 or to otherwise include any additional terms or conditions in a solicitation or contract for commercial items **inconsistent** w/customary commercial practices **MUST**:
 - Describe the customary commercial practice, supported by market research, found in the marketplace;
 - Support the need to include a term or condition that is inconsistent with that practice;
 - Include a determination that use of the customary commercial practice is inconsistent with the needs of the Government; and
 - Be approved by the HCA or, if delegated, by a designee not lower than CCO at subordinate contracting organization; **EXCEPT**, ASN(RD&A) approval of the waiver is required if any new terms or conditions will be added.



Requests for Approvals - Supplementing

- Requests for approval to add a new Clause pursuant to FAR 12.301(f) (e.g. an HCA Component clause or other clause not listed in the DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses) MUST:
 - Include the text of the proposed clause and a detailed rationale explaining why there is a need for this new clause;
 - Address whether the proposed clause will have a significant effect beyond the internal operating procedures of the agency and/or a significant cost or administrative impact on contractors or offerors, and give reasons to support the statement; and

Follow NMCARS 5212.301 and Annex 7 when NSPE or DPAP approval is needed to include additional provisions/clauses in CI acquisitions.



Provision/Clause Selection Process

- FAR Subpart 12.3 prescribes five provisions and clauses for C/I acquisitions.
- DFARS Subpart 212.3 prescribes additional clauses and provisions.
- NMCARS 5212.3, 5252.3 and Annex 7 establish the DON policy, procedures and other guidance applicable to provision and clause use in CI acquisitions.
 - NMCARS 5252.3 provides the Navy's matrix of FAR/DFARS and other Government-unique provisions/clauses authorized for use in CI acquisitions.
 - Annex 7 includes a provision/clause use approval matrix and detailed procedures, including a "decision tree" summarizing the provision/clause selection process.



Provision/Clause Selection Process:

- FAR 52.212-1, Instructions to Offerors – Commercial Items (Jun 2008)
- FAR 52.212-2, Evaluation — Commercial Items (Jan 1999)
- FAR 52.212-3, Offeror Representations and Certifications--Commercial Items (Feb 2009)
- FAR 52.212-4, Contract Terms and Conditions — Commercial Items (Mar 2009)
- FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders (Feb 2010) or Deviation of (Apr 2009)



Provision/Clause Selection Process:

Standard FAR CI Provision

FAR 52.212-1, Instructions to Offerors Commercial Items (Jun 2008)

- Provides a single, streamlined set of instructions to be used when soliciting offers for commercial items.
- Can be incorporated in the solicitation by reference.
- The Contracting Officer may tailor these instructions and/or provide additional instructions specific to the acquisition in accordance with FAR 12.202.

Tailored parts of the provision shall be stated in an addendum.



Provision/Clause Selection Process:

Standard FAR CI Provision **FAR 52.212-2 Evaluation - Commercial (continued) Items (Jan 1999)**

- Use when the use of evaluation factors is appropriate, the Contracting Officer may tailor these instructions and/or provide additional instructions specific to the acquisition in accordance with FAR 12.302.
- Tailor as an addendum (see FAR 12.302(d)) containing all evaluation factors required by FAR 13.106, FAR 14.2, or FAR 15.3.



Provision/Clause Selection Process:

Standard FAR CI Provision

FAR 52.212-3, Offeror Representations and Certifications - Commercial Items (Feb 2009)

- Provides a single, consolidated list of representations and certifications for the acquisition of commercial items;
- Is attached to the solicitation for offerors to complete and return with their offers, and
- **Cannot be tailored unless a deviation is obtained in accordance with FAR Subpart 1.4, Deviations.**



Provision/Clause Selection Process:

FAR 52.212-4, Contract Terms and Conditions - Commercial Items (Mar 2009)

- Lists twenty (20) specific terms and conditions which, to the maximum extent practicable, are consistent with customary commercial practices.
- May be incorporated in the contract by reference.
- Can be tailored in accordance with FAR 12.302 consistent with customary commercial practices, except for six (6) specified paragraphs that implement statutory requirements.
- **Adding of new terms and conditions (beyond the 20 pre-existing) requires ASN(RD&A) approval.**

Details of these 20 specific terms and conditions are described in the following slides.



Provision/Clause Selection Process Standard FAR CI

Clauses (continued)

FAR 52.212-4 Contract Terms and Conditions - Commercial Items (Mar 2009)

***These six statutory requirements shall not be tailored (FAR 12.302(b)):**

a) Inspection/Acceptance

b) Assignment *

c) Changes

d) Disputes*

e) Definitions

f) Excusable Delays

g) Invoice*

h) Patent Indemnity

i) Payment * (except as provided in Subpart 32.11)

j) Risk of Loss

k) Taxes

l) Termination for Convenience

m) Termination for Cause

n) Title

o) Warranty

p) Limitation of Liability

q) Other Compliances*

r) Compliance with Laws Unique to Government Contracts*

s) Order of Precedence

t) Central Contractor Registration



Provision/Clause Selection Process

Standard FAR CI Clauses - Tailoring

- The previous slide identifies the six (6) statutory terms and conditions in FAR 52.212-4, Contract Terms and Conditions - Commercial Items (Mar 2009) that, by law, cannot be tailored.
- There are 14 remaining terms and conditions that may be tailored.
- **Tailoring of these terms and conditions does NOT consist of incorporating other FAR clauses pertaining to those same terms and conditions.**
 - For example, ***Do Not Include:***
 - Inspection/acceptance clauses found in FAR Part 46, Quality Assurance;
 - Change clauses found in FAR Part 43, Contract Modifications;
 - Termination for Convenience or Termination for Default clauses found in FAR Part 49; or
 - Other FAR clauses relevant to the FAR 52.212-4 terms and conditions.
- Tailoring may ONLY be done after market research to reflect customary commercial practice found.
 - Unless approval is obtained to tailor inconsistent with commercial practice.



Provision/Clause Selection Process Standard FAR CI

Clauses (continued)

FAR 52.212-4 Contract Terms and Conditions - Commercial Items (Mar 2009)

***These terms and conditions may be tailored, consistent or inconsistent with customary commercial practices, in accordance with FAR 12.302(a) or FAR 12.302(c):**

- a) Inspection/Acceptance*
- b) Assignment
- c) Changes*
- d) Disputes
- e) Definitions*
- f) Excusable Delays*
- g) Invoice
- h) Patent Indemnity*
- i) Payment (except as provided in Subpart 32.11)
- j) Risk of Loss*
- k) Taxes*

- l) Termination for Convenience*
- m) Termination for Cause*
- n) Title*
- o) Warranty*
- p) Limitation of Liability*
- q) Other Compliances
- r) Compliance with Laws Unique to Government Contracts
- s) Order of Precedence*
- t) Central Contractor Registration*



Provision/Clause Selection Process

Standard FAR CI Clauses - Tailoring

- Tailoring consistent with commercial practice
 - Example: Commercial warranty for item purchased provides 12 months parts & labor; client desires 36 months parts and labor. Market research reveals customary commercial practice is for vendors to offer an extended warranty for an additional expense. This meets the client's requirement.
 - Contract Specialist documents results in contract file.

~~Contracting Officer approves tailoring of FAR~~

Tailoring shall be done via addenda per FAR 12.302(d).



Provision/Clause Selection Process

~~Standard FAR CI Clauses – Tailoring~~

- Tailoring inconsistent with commercial practice
 - Example: Commercial warranty for item purchased provides 12 months parts & labor; client desires 60 months parts and labor. Unless an extended warranty up to 60 months is offered as a customary commercial practice for the item being acquired, this additional warranty period is inconsistent with customary commercial practices.
 - Requires written justification for a waiver addressing FAR 12.302(c) factors.
 - HCA, or if delegated, a CCO at a subordinate contracting organization, must approve the waiver.
 - HCA may not delegate below this level
- Tailoring shall be done via addenda per FAR 12.302(d).



Provision/Clause Selection Process

~~Standard FAR Clauses – Tailoring~~

- Example of an addendum to FAR 52.212-4:
 - FAR 52.212-4(o), Warranty, states:

“The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.”
 - An addendum to this term and condition, to be added after FAR 52.212-4, may read as follows:

“The following is an addendum to FAR 52.212-4:

(o) Warranty. The contractor will provide the Government a 36 month parts and labor warranty on

The contract file documentation must demonstrate the appropriateness of any addendum included.



Provision/Clause Selection Process:

~~Standard FAR CI Clauses~~

FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Commercial Items (Feb 2010)

- FAR 12.301(b)(4) requires the use of this clause for CI acquisitions.
- Includes a checklist of clauses that implement provisions of law/Executive Orders applicable to commercial item acquisitions.
- For Standard Procurement System (SPS) contract actions:
 - Comply with DPAP memo of 01 May 2009, which requires use of FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders —Commercial Items (Apr 2009) (DEVIATION).
 - Use SPS clause logic to automatically select and individually list applicable clauses set forth under FAR 52.212-5.
- For non-SPS contract actions, manually select which listed clauses in FAR 52.212-5 apply to the instant acquisition.



Provision/Clause Selection Process: DFARS CI

~~Provisions/Clauses~~

- DFARS 212.301(f) requires inclusion of the following in commercial item solicitations/contracts:
 - (i) One of the following provisions as prescribed in Part 225:
 - DFARS 252.225-7000, Buy American Act--Balance of Payments Program Certificate.
 - DFARS 252.225-7020, Trade Agreements Certificate.
 - DFARS 252.225-7035, Buy American Act--Free Trade Agreements--Balance of Payments Program Certificate.
 - (ii) DFARS 252.212-7000, Offeror Representations and Certifications--Commercial Items, shall be included in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.7603), indicate on an addendum that "The certification in paragraph (b) of the provision at 252.212-7000 does not apply to this solicitation."



Provision/Clause Selection Process: DFARS CI

~~Provisions/Clauses (continued)~~

- (iii) DFARS 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items (Nov 2009), completing paragraphs (a) and (b) as appropriate.
 - Includes a checklist of clauses that implement provisions of Law/Executive Orders applicable to commercial item acquisitions.
 - Requires we manually “check a box” to identify which listed clauses from DFARS 252.212-7001 apply to the instant acquisition (used for non-SPS actions).
- DoD Class Deviation 2009-O0005, Commercial Item Omnibus Clauses for Acquisitions Using the Standard Procurement System, issued on 01 May 2009 applies to contract actions issued in SPS.
 - Use DFARS 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items (Apr 2009) (DEVIATION) per DPAP memo of 01 May 2009.
 - Use SPS clause logic to automatically select and individually list applicable clauses set forth under DFARS 252.212-7001.



Provision/Clause Selection Process: DFARS CI

~~Provisions/Clauses (continued)~~

- Other Required DFARS Clauses per 212.301(f)(iv) through (xiii):
 - 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, as prescribed in 209.104-70(a).
 - 252.232-7009, Mandatory Payment by Governmentwide Commercial Purchase Card, as prescribed in 232.1110.
 - 252.211-7003, Item Identification and Valuation, as prescribed in 211.274-4.
 - 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402-4.
 - 252.225-7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225-7040.
 - 252.211-7006, Radio Frequency Identification, as prescribed in 211.275-3.
 - 252.232-7010, Levies on Contract Payments, as prescribed in 232.7102.
 - 252.246-7003, Notification of Potential Safety Issues, as prescribed in 246.371.
 - 252.247-7026, Evaluation Preference for Use of Domestic Shipyards – Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(e).
 - 252.225-7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003-5(b).



Provision/Clause Selection Process: Other Government-Unique Provisions/Clauses

- Solicitations and contracts for DOD Theater Business Clearance covered actions supporting the Joint Contracting Command/Iraq Afghanistan **must** also include the provisions and clauses available on the Central Command Contracting Webpage at

http://www2.centcom.mil/_layouts/AccessAgreement.aspx

OR via the DPAP webpage for contingency contracting under “Special Instructions for Iraq and Afghanistan” at <http://www.acq.osd.mil/dpap/pacc/cc/index.html>.

- No HCA component provision or clause is authorized for use in solicitations and contracts for commercial items **unless** it has been approved by the NSPE (ASN(RD&A)) in accordance with NMCARS 5212.301.



Provision/Clause Selection Process:

DON Matrix of FAR/DFARS and Other

Provisions/Clauses

- NMCARS 5252.3 establishes a DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses applicable only to solicitations and contracts for CI acquisitions issued pursuant to FAR Part 12 procedures.
 - Serves only as a reference tool--assists Contracting Officers in determining provision/clause use in CI acquisitions.
 - Consists of two lists containing FAR/DFARS/Other Government-Unique provisions/clauses:
 - One applies to non-SPS contract actions.
 - The other applies to contract actions issued in SPS and that include DPAP deviation to omnibus clauses FAR 52.212-5 and DFARS 252-212-7001.
 - Contracting Officers remain responsible for ensuring that CI acquisitions include only properly authorized provisions/clauses as prescribed by FAR 12.3/DFARS 212.3/NMCARS 5212.3.

Access the DON Matrix of provisions/clauses at
https://acquisition.navy.mil/rda/home/policy_and_guidance/nmcars



Resources

- DON Commercial Item Acquisitions Provision/Clause Use Procedures
https://acquisition.navy.mil/rda/home/policy_and_guidance/nmcars
- DON Provision/Clause Use Decision Tree for Commercial Item Acquisitions
https://acquisition.navy.mil/rda/home/policy_and_guidance/nmcars
- DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses For Commercial Item Acquisitions
https://acquisition.navy.mil/rda/home/policy_and_guidance/nmcars



Resources (continued)

- DON Plan for Restricting Government-Unique Contract Clauses on Commercial Item Contracts
http://acquisition.navy.mil/rda/home/policy_and_guidance/policy_memos/2008_policy_memoranda/plan_for_restricting_government_unique_contract_clauses_on_commercial_contracts_m_f_jaggard_07_11_2008
 - “DoD Commercial Item Handbook” Nov 2001
<http://www.acq.osd.mil/dpap/Docs/cihandbook.pdf>
or <https://acc.dau.mil>
 - DAU Continuous Learning Courses*
 - CLC023 Commercial Item Determination - Executive Overview
 - CLC020 Commercial Item Determination
 - CLC131 Commercial Item Pricing
- *Available through: <http://www.dau.mil/clc/default.aspx>



Summary

- Provision/Clause use in CI Acquisitions differs from non-commercial acquisitions.
- Contracts for commercial items must, to the maximum extent practicable, include only those contract clauses needed to implement law, regulation, or Executive Order or those determined to be consistent with customary commercial practice.
- FAR provides authority to tailor FAR Part 12 provisions/contract clauses when tailoring is consistent with customary commercial practices—must be verified by market research and documented in contract the file.
- NMCARS 5212.302(c) sets forth waiver requirements for Tailoring (revising, not adding) FAR Part 12 provisions/clauses in a manner inconsistent with commercial practice—requires approval of HCA or a designee no lower than CCO at subordinate contracting organizations (if delegated by HCA).
- NMCARS 5212.301(f) sets forth approval requirements for Supplementing FAR 12 provisions/clauses with use of additional provisions/clauses (including HCA provisions/clauses), requires ACN (DDCA) or DDAB approval.

See NMCARS Annex 7, which summarizes overall DON Commercial Item Acquisitions Provision/Clause Use Procedures.